

F I L E D
AUG 11 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-71

JOHN M. DINEEN and JOHN HENSLEY, on behalf of themselves and FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7, and all others similarly situated; FRATERNAL ORDER OF POLICE OF ILLINOIS, a not-for-profit organization, on behalf of itself and all others similarly situated,

Petitioners,

vs.

RICHARD J. DALEY, Mayor of the City of Chicago, and
CITY COUNCIL OF CHICAGO, ILLINOIS,

Respondents.

**On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit**

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the district court is reproduced at App. A of the petition. The unpublished order of the United States Court of Appeals for the Seventh Circuit is reproduced at App. B of the petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 15, 1977. A petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The questions presented are adequately set forth in the petition.

ORDINANCE INVOLVED

The City of Chicago Ordinance establishing the Executive Department of Personnel, Chapter 25.1 of the Municipal Code, is reprinted herein at Appendix A.

STATEMENT

In 1895 the General Assembly of the State of Illinois enacted a Civil Service Act governing public employment which set forth certain procedures for hiring, promotions and dismissals. (Ill. Rev. Stat. 1975, ch. 24, pars. 10.1-1 *et seq.*).

The 1970 Constitution of the State of Illinois altered the relationship which had existed between the state and its municipalities. Under the new provisions local governments

were to possess most governmental powers unless specifically denied them by Statute. ILL. CONST. art. VII, §6(g), (h), (i), (j) (1970).

Pursuant to its home rule powers conferred by the 1970 Constitution the City Council of Chicago enacted Chapter 25.1 of the Municipal Code of Chicago which established a Department of Personnel to replace the Civil Service Commission. (App. A). The ordinance, effective January 1, 1976, requires the Department to develop and promulgate personnel rules in conformity with certain guidelines set out in the ordinance.

The petitioners filed a complaint in the United States District Court for the Northern District of Illinois alleging that the Personnel Ordinance violates their first, fifth, ninth, and fourteenth amendment rights because rules which may be adopted by the Department in the future may impair their present statutory rights under the Civil Service Act of the State of Illinois. They sought the convening of a three-judge court pursuant to 28 U.S.C. §2281, a declaration of the unconstitutionality of the ordinance and an injunction against its enforcement.

In a memorandum opinion Judge Bernard Decker denied petitioners' motion to convene a three-judge court since the City of Chicago Personnel Ordinance is not a statute of general and statewide application within the meaning of Section 2281. The court also found that the injuries alleged by the petitioners were merely speculative and as such did not present a controversy ripe for determination. (App. A of Petition).

In an unpublished order the United States Court of Appeals for the Seventh Circuit affirmed the decision of the district court without oral argument. (App. B of Petition).

ARGUMENT

I.

The petitioners have failed to present a case which falls within one of the classes set forth in Supreme Court Rule 19 governing the issuance of writs of certiorari to the courts of appeals.¹ There is no claim that the decision below is in conflict with a decision of another court of appeals on the same matter.

The issues of federal law decided by the court below were not novel, nor did they pose an important constitutional problem which should be considered by this Court.

The petitioners have not shown a direct conflict between the decision of the court below and a decision of this Court, nor have they invoked this Court's supervisory powers. Clearly, this case does not warrant review by this Court on certiorari.

Furthermore, the respondents submit that this Court should decline to review the decision in this case since the doctrine of abstention, although not relied upon by the courts below, applies in this case making it unnecessary for this Court to consider the federal constitutional arguments advanced by the petitioners.

¹ "... (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The substance of petitioners' constitutional argument appears to be that the Illinois Civil Service Act gives them certain vested and thus constitutionally protected rights in hiring, promotions, and in suspension and dismissal hearings. They contend that rules which may be promulgated by the Department of Personnel may deprive them of these rights.

The courts of the State of Illinois have not yet had an opportunity to construe the Personnel Ordinance. Relevant provisions of the ordinance may fairly be read to confer the very rights which employees enjoyed under the Civil Service Act.

For example, the ordinance cannot fairly be construed to deprive the petitioners of their right to notice and a hearing before removal or suspension. Section 25.1-13 of the ordinance (App. 10) specifically preserves the powers and duties of the Police Board under Section 10-1-18.1 of the Civil Service Act (App. 12a-14a of Petition) to provide notice of charges and hearings before dismissal or suspension.

When it is apparent that the interpretation of a controlling statute by a state court may obviate a decision of the constitutional issue, the federal courts should abstain from deciding the federal constitutional question pending resolution of the issue of state law in the state courts. *Boehning v. Indiana State Employees Association, Inc.*, 423 U.S. 6 (1975); *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

II.

The three judge court procedure which the petitioners requested is available only when a party "... seeks to inter-

pose the Constitution against enforcement of a state policy . . ." *Phillips v. United States*, 312 U.S. 246, 251 (1941).

The court below correctly found that the Personnel Ordinance under attack was not one of statewide application. (App. 8a of Petition). Petitioners' argument that the ordinance embodied a statewide policy since it was enacted pursuant to home rule powers granted by the state constitution was correctly rejected as one which ". . . strains the imagination." (App. 7a of Petition).

The petitioners quote extensively from the case of *Krezewinski v. Kugler*, 338 F. Supp. 492 (D.N.J., 1972), (Petition p. 8) in an effort to characterize the Chicago Personnel Ordinance as one similar to a New Jersey ordinance which was found to be of statewide application and reviewed by a three judge court. The court below correctly found this authority to be inapposite since the ordinance attacked in *Krezewinski* was part of a statewide plan which could be waived by municipalities. The Personnel Ordinance on the other hand is unique to the City of Chicago; it was enacted independent of any state policy.

Since there is no jurisdictional basis on which to convene a three judge court, the court below properly affirmed the denial of petitioners' request.

It should be noted that the three judge court procedure has recently been greatly limited by Congress (see 28 U.S.C. §2284, effective August 12, 1976). Under the new statute a panel of three judges would not be convened to hear a case of this nature. Since Congress alone has the power to define the jurisdiction of the inferior federal courts, the courts below could not now provide the petitioners with the requested procedure. (U.S. Const. art. III, §1; *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850)).

The court below correctly found that since no personnel rules have been promulgated in accordance with the guidelines set forth in the ordinance, the petitioners' complaint alleged merely speculative injury and as such does not present an actual case or controversy. (App. 8a of Petition).

In their petition to this court the petitioners fail to address this serious deficiency in their lawsuit stating only that they ". . . are jeopardized by the newly created ordinance . . ." (Petition p. 14). Instead they argue that the Civil Service Act has created constitutionally protected rights in the manner in which employees are hired, promoted and discharged. It is asserted that these rights are not only proprietary but contractual in nature and as such may not be impaired by a city ordinance in the absence of a compelling city interest. (Petition p. 12).

The petitioners cite the case of *Bishop v. Wood*, 426 U.S. 341 (1976) to support their argument, but the language quoted (Petition p. 11) is that used by the court in an explanatory footnote to the opinion (426 U.S. 341 n. 8) and does not express the holding in the case. In *Bishop* this court held that the sufficiency of a claim to a property interest in employment must be decided by reference to state law. (*Id.* at 344). Clearly where the statutory provisions are amended, or as in the instant case, where they are superseded by the exercise of home rule powers, the rights of public employees are created and defined by the amended or superseding law. To adopt the petitioners' reasoning would be to hold that a state or home rule unit could never constitutionally change its statutory scheme governing employment practices for public employees.

The court below correctly affirmed the dismissal of plaintiffs' suit as one which lacks sufficient ripeness, but considering its lack of a meritorious constitutional challenge to the Chicago Personnel Ordinance the trial court could have correctly dismissed it on the merits.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 10, 1977

APPENDIX A

Ordinance Creating New Chapter 25.1 To Municipal Code For Establishment Of Executive Department Of Personnel

Whereas, The City of Chicago is a home rule unit within the meaning of the Illinois Constitution of 1970; and

Whereas, The City of Chicago, as a home rule unit, may exercise any power and perform any function pertaining to its government and affairs; now, therefore,
Be It Ordained by the City Council of the City of Chicago:

Section 1. The Municipal Code of the City of Chicago is hereby amended by adding thereto a new Chapter 25.1 creating a Department of Personnel, performing the functions hitherto performed by the Civil Service Commission, as follows:

25.1-1. It is the general purpose of this ordinance, and it is necessary in the public interest, to establish a system of personnel administration that meets the social, economic, and program needs of the people of the City of Chicago, to provide for a professional and progressive merit system for employment and to insure flexible career service within the City of Chicago by substituting a public employment system superseding the Civil Service System now operating within the City of Chicago pursuant to the law of the State of Illinois.

25.1-2. There is hereby established an Executive Department of the City of Chicago which shall be known as the Department of Personnel. The Director of Personnel shall be the Chief Executive Officer of the Department of Personnel and shall be appointed by the Mayor with the advice and consent of the City Council and shall serve at the pleasure of the Mayor. The Director of Personnel shall be responsible for the general management and control of the Department of Personnel in a manner consistent with

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the ordinances of the City, the laws of the State, and the rules of the Department. The Director of Personnel shall have the power and duty to:

- 1) Encourage and exercise leadership in the development of effective personnel administration within the several departments in the government service, and to make available the facilities of the Department of Personnel to this end.
- 2) Advise the Mayor on utilization of employees.
- 3) Foster and develop programs for the improvement of employee effectiveness including but not limited to position classification, salary administration, recruitment, selection, promotion, performance ratings, probationary periods, training, safety and health.
- 4) Investigate from time to time the operation and effect of this ordinance and of the rules made thereunder and to report his findings and recommendations to the Mayor.
- 5) Establish and maintain records of all employees in the City service, in which there shall be set forth as to each employee the class title, pay and status, and other relevant data.
- 6) Make an annual report to the Mayor regarding the work of the Department.
- 7) Certify that persons named on every payroll have been appointed and employed in accordance with the provisions of this ordinance and the rules adopted thereunder. No city disbursing or auditing officer shall make or approve or take any part in making or approving any payment for personal service to any persons holding a position in the city service unless said payroll voucher or account of such pay bears the certification of the director or his authorized agent.

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- 8) Apply and carry out this ordinance and the rules thereunder and to perform any other lawful acts which may be necessary or desirable to carry out the purposes and provisions of this ordinance.

25.1-3. The city career service shall include all positions in the city service except the following:

1. Elected officials.
2. Executive heads of city departments.
3. Members of boards and commissions whose appointment is subject to confirmation by the City Council.
4. Employees of the Law Department.
5. Police officers above the rank of Captain and firefighters above the rank of Battalion Chief.
6. Employees whose work is seasonal and does not exceed 180 days in any calendar year.
7. A private secretary for each elected official.
8. Administrative assistants to the Mayor, and such employees of the Mayor's office appointed by the Mayor.
9. Employees of the City Council unless such positions are specifically included in the career service by ordinance.
10. Any additional positions exempted pursuant to rule of the department upon recommendation of a department head and after comment and recommendation by the Director of Personnel and the approval of the Mayor. These additional exemptions must be based on the need for flexibility in appointment to positions which (a) involve the determination of policy, or (b) are required to insure the implementation of policy, or (c) are necessary in order to maintain

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tain confidentiality, or (d) are administratively necessary in order to effect a program including, but not limited to, such programs as student work experience programs, trainee programs, federal public service employment programs, and any other programs, which, because of the program requirements, cannot be subject to career service requirements.

25.1-4. There is hereby created a Personnel Board consisting of the Director of Personnel and four additional members appointed by the Mayor by and with the advice and consent of the City Council, for a term of five years, or until their respective successors are appointed and qualified, except that of the initially appointed Board, two members shall be appointed for three years, and two members for five years. Upon the expiration of the term of any member of the Personnel Board other than the Director of Personnel, the Mayor by and with the advice and consent of the City Council, shall appoint each successor for a term of five years and each member shall serve until a successor is appointed and qualified. A vacancy shall be filled for the remainder of an expired term in the same manner as original appointments. The Personnel Board shall elect one of its members as Chairman. Each member of the Board shall hold office until his successor is appointed and confirmed. The Board will have the responsibility of providing advice and counsel to the Mayor and to the Director of Personnel on all aspects of public personnel administration including, but not limited to, manpower utilization, manpower training, employee grievances and employee salaries, in addition to other duties as provided by this Chapter.

25.1-5. The Director of Personnel shall issue personnel rules with the approval of the Personnel Board. Prior to the effective date of such rules, the Director of Personnel shall give public notice in one or more newspapers of gen-

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eral circulation, and in no case shall such publication be less than ten (10) days before the effective date of the proposed rule or amendment to the rule. Such public notice shall include information concerning where the rules can be reviewed and where comments may be directed. Nothing contained herein shall prohibit the Director of Personnel from giving any additional public notice that he may deem appropriate. The rules shall provide:

- 1) For the preparation, maintenance and revision of a position classification plan for all positions in the career service, based upon similarity of duties performed and responsibilities assigned, so that the same qualifications may reasonably be required for and the same schedule of pay may equitably be applied to all positions in the same class.
- 2) For the annual submission of a pay plan to the Mayor.
- 3) For the recruitment and selection of persons in the city career service on the basis of their relative fitness.
- 4) For the establishment of eligible lists for appointment and promotion, upon which lists shall be placed the names of successful candidates in order of their relative excellence in the respective examinations. The Director may substitute rankings such as excellent, well-qualified and qualified for numerical ratings and establish eligible lists accordingly. Such rules may provide for lists by area or location, by department or other agency, for removal of those not available for or refusing employment, for minimum and maximum duration of such lists, and for such other provisions as may be necessary to provide rapid and satisfactory service to the operating agencies. The rules may authorize removal of eligibles from lists if those eligibles fail to furnish

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evidence of availability upon forms sent to them by the Director.

- 5) For the certification to an appointing authority of the names (a) of the five highest persons available on the appropriate eligible list to fill each vacancy, or (b) from the highest ranking group if the list is by rankings instead of numerical ratings.
- 6) For promotions which shall give appropriate considerations to the applicant's qualifications, record of performance and ability.
- 7) For probationary periods after original appointment not to exceed one year.
- 8) For emergency employment for not more than 90 days with the consent of the Director and for provisional employment when there is no appropriate eligible list available. No such provisional appointment shall continue longer than nine months, nor shall successive provisional appointments be allowed except during the first two years after the effective date of this ordinance.
- 9) For keeping records of performance of all employees in the career service, which performance records shall be considered in determining salary increments or increases for meritorious services; as a factor in promotions; as a factor in reinstatements; and as a factor in discharges and transfers.
- 10) For lay-offs by reason of lack of funds or work, or abolition of a position, or material change in duties or organization, and for reemployment of employees so laid off.
- 11) For establishment of a plan for resolving employee grievances and complaints.

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- 12) For the establishment of disciplinary measures such as suspension, demotion in rank or grade, or discharge. Such measures shall provide for presentation of charges, hearing rights, and appeals for all permanent employees in the career service, consistent with the requirements of due process in law.
- 13) For development and operation of programs to improve work effectiveness, including training, education, safety, health, welfare, counseling, recreation and employee relations.
- 14) For such other policies and administrative regulations, not inconsistent with this law as may be proper and necessary for its enforcement.

25.1-6. The Personnel Board, a member thereof, or a hearing officer appointed by the Board shall conduct a hearing of all charges brought against any career service employee by proper authority for purposes of discharge, demotion, or suspension for a period of more than thirty days. The Personnel Board shall provide by rule for review by the Board, a member thereof, or hearing officer of suspensions not exceeding thirty days. The Personnel Board, any of its members, or a hearing officer appointed by the Board may administer oaths and secure by subpoena both the evidence and witnesses for the production of relevant books and papers. All proceedings before the Board, a member thereof, or the hearing officer shall be recorded. The findings and decision of a member of the Board or hearing officer shall be certified to the Personnel Board, which may accept or reject the findings and decision or may require further hearing before the Board. After the Board accepts the findings and decision of its member or hearing officer, or after a hearing by the Personnel Board, it shall certify the findings and decision to the Director of Personnel who shall then notify the appropriate appointing authority and said appointing authority shall then enforce the findings

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and decision forthwith. Nothing in this section limits the power of the appointing authority to suspend a subordinate for a reasonable period not exceeding thirty days pursuant to the rules of the Department of Personnel.

25.1-7. No person shall discriminate against any employee or applicant for employment because of race, creed, color, sex or national origin.

25.1-8. A. No person shall directly or indirectly coerce, attempt to coerce or command any employee in the career service to pay, lend or contribute anything of value to a party, committee, organization, agency, or person for political purposes. No employee in the career service may use his or her official authority or influence in the career service for the purpose of affecting or interfering with the result of an election or nomination for a political office. Nothing herein contained shall affect the right of the employee to hold membership in, and support, a political party, to vote as he chooses, to express his opinions on all political subjects and candidates, to maintain political neutrality, and to attend political meetings.

B. No person shall make any false statement, certificate, mark, rating or report with regard to any test, certification or appointment made under any provision of this ordinance or in any manner commit or attempt to commit any fraud, prevent the impartial execution of this ordinance and any rules issued thereunder.

C. No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service or other valuable consideration for any appointment, proposed appointment, promotion or proposed promotion to, or any advantage in a position in the career service.

D. No employee of the Department of Personnel, examiner, or other person shall defeat, deceive or obstruct any person in his right to examination, eligibility, certification

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or appointment under this ordinance, or furnish to any person any special or secret information for the purpose of affecting the rights of any person with respect to employment in the career service.

E. Any person who wilfully violates this section shall be fined not less than \$100 nor more than \$500 or be imprisoned for not ~~more~~ than six months, or both. Any person who is convicted of a violation of this section shall, for a period of five years, be ineligible for appointment to or employment in a position in the career service, and if he is an officer or employee of the city shall forfeit his office or position.

25.1-9. Employees holding positions in the career service herein for one year or more immediately prior to the adoption of this ordinance unless exempted pursuant to this chapter shall be continued in their respective positions without further examination, until separated from their positions as provided by ordinance or by rule. Those holding their positions less than one year immediately prior to the adoption of this ordinance shall serve a probationary period as prescribed by rule. Those who shall have failed to qualify as provided herein shall be dismissed from their position within 30 days after the establishment of an eligible list for their respective positions. Nothing herein shall preclude the reclassification or reallocation as provided by this chapter of any position held by such incumbent.

25.1-10. The Department of Personnel is authorized and empowered to enter into reciprocal agreements, upon such terms as may be agreed upon, for the use of equipment, materials, facilities, and services with any public agency or body for purposes deemed of benefit to the career service. The Department of Personnel may cooperate with other governmental agencies charged with public personnel administration in conducting personnel tests, classification of positions, recruiting personnel and training personnel.

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25.1-11. The words "Department of Personnel" and "career service" shall be substituted wherever the words "Civil Service Commission" and "Civil Service" appear in this code.

25.1-12. All rules and regulations of the Civil Service Commission not contrary to or inconsistent with the terms of this ordinance shall remain in force until they expire by their own limitation or are altered or amended or repealed pursuant to this ordinance.

25.1-13. This ordinance shall not apply nor have any effect upon the Police Board, its manner of selection, composition, or its powers and duties as set forth in Section 11-2 and Section 11-3 of this Code and Section 3-7-3.1, Section 10-1-18.1, and Section 10-1-45 of the Illinois Municipal Code. Nor shall this ordinance have any effect upon the selection, powers and duties of the Superintendent of Police as set forth in the Municipal Code of the City of Chicago and Section 3-7-3.2 of the Illinois Municipal Code.

25.1-14. The Mayor may, in his discretion, remove any member of the Personnel Board for incompetence, neglect of duty or malfeasance in office. The Mayor shall forthwith notify the City Council in writing of any such removal. Any vacancy created by such removal by the Mayor shall be filled by the Mayor pursuant to the provisions of Section 25.1-4.

25.1-15. If any provision, clause, sentence, paragraph, section or part of this ordinance shall, for any reason, be adjudged by a court of competent jurisdiction to be unconstitutional or invalid, said judgment shall not affect, impair or invalidate the remainder of this ordinance. It is hereby declared to be the legislative intent of the City Council that this ordinance would have been adopted had such unconstitutional or invalid provision, clause, sentence, paragraph, section or part thereof not been included.

Section 2. This ordinance shall take effect the first day of January, 1976.
